

(11)

Office - Supreme Court, U. S.

FILED

NOV 12 1942

CHARLES ELIJAH COOKLEY

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 523

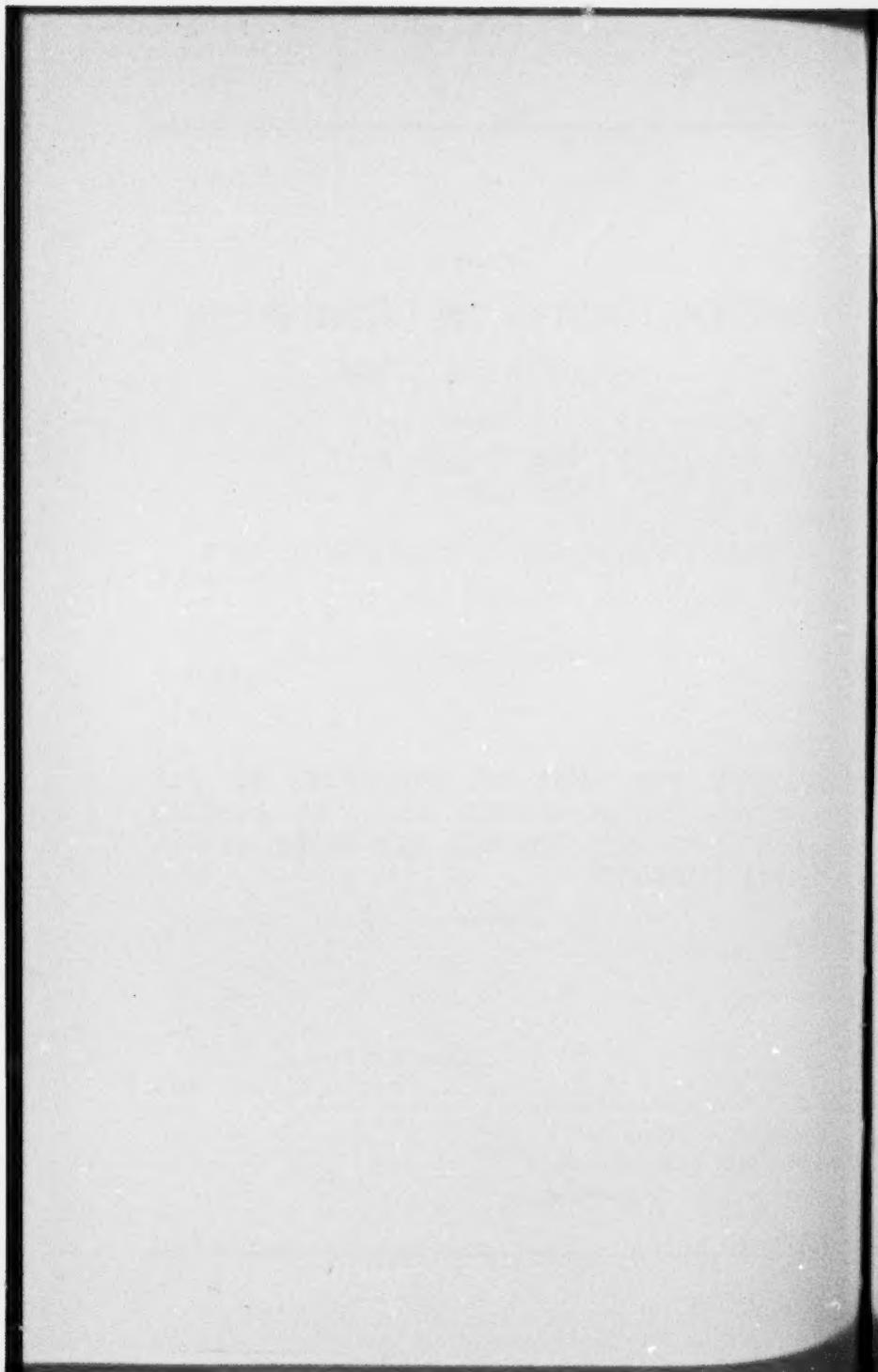
HERMAN BANNING AND FRANK WILLIAMS,
Petitioners,
vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT; AND BRIEF IN SUP-
PORT THEREOF.**

ARTHUR R. SEELIG,
Counsel for Petitioners.

JOSEPH E. GREEN,
RICHARD J. GLEASON,
Of Counsel.



I N D E X .

	PAGE
Petition for writ of certiorari.....	1
Summary and short statement of the matter involved	2
Statement of the basis upon which it is contended that this court has jurisdiction to review the judgment in question.....	8
Statement of the questions presented.....	9
Statement of the reasons relied on for the allowance of the writ.....	11
Prayer	11
 Brief in support of petition :	
I. Opinion of court below.....	12
II. Jurisdiction	12
III. Statement of the case.....	12
IV. Specification of errors.....	19
V. Summary of argument.....	21
VI. Argument	22
1. The evidence of guilt is doubtful and uncertain. The evidence of innocence is substantial and persuasive. Therefore, if serious error has intervened, the convictions should be reversed.....	22
2. The Circuit Court of Appeals has so far sanctioned a departure by the trial court from the accepted and ordinary course of judicial proceedings as to call for an exercise of this court's power of supervision	25
3. The errors assigned gravely prejudice petitioners and require a reversal of the judgments now under review.....	42
VII. Conclusion	45

LIST OF AUTHORITIES.

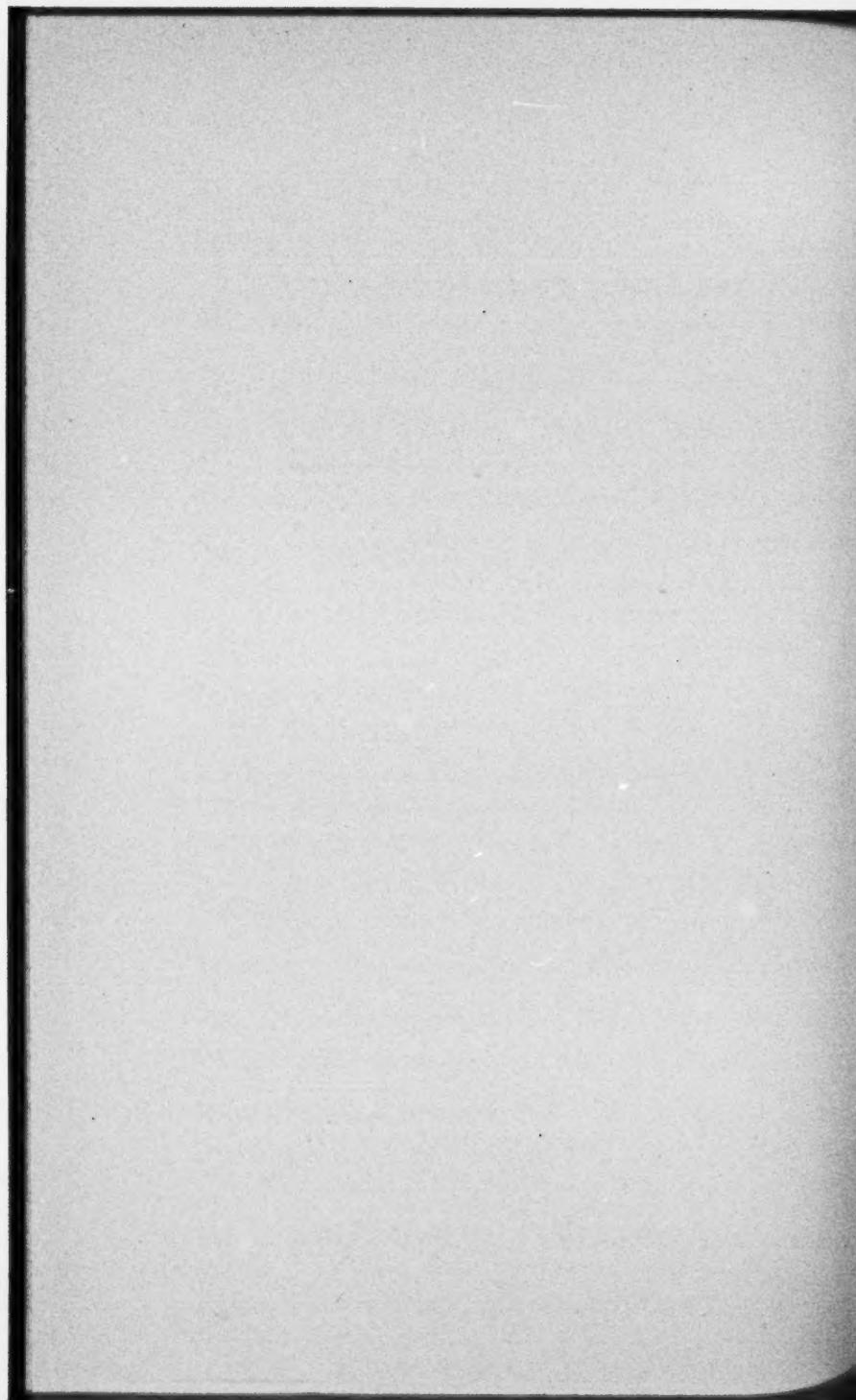
	PAGE
Berger v. United States, 295 U. S. 78.....	39
Boyd v. United States, 142 U. S. 450.....	33, 37
Crinnian v. United States, 117 Fed. (2d) 526 (C. C. A. 6th)	35
Egan v. United States, 287 Fed. 958.....	40
Eley v. United States, 117 Fed. (2d) 526 (C. C. A. 6th)	34
Filippon v. Albion Vein Slate Co., 250 U. S. 76, 82.....	43
Glover v. United States, 147 Fed. 426 (C. C. A. 8th)	38
Haussner v. United States, 4 Fed. (2d) 888 (C. C. A. 8th)	40
Little v. United States, 93 Fed. (2d) 401 (C. C. A. 8th)	40
Manning v. United States, 287 Fed. 800 (C. C. A. 8th)	38
McCandless v. United States, 298 U. S. 342.....	23, 24, 42
Mitrovich v. United States, 15 Fed. (2d) 163 (C. C. A. 9th)	40
Nepper v. United States, 93 Fed. (2d) 409.....	24, 25, 43
Paquin v. United States, 251 Fed. 579 (C. C. A. 8th)	36, 37
People v. Zachowitz, 254 N. Y. 192, 172 N. E. 466.....	40
Salerno v. United States, 61 Fed. (2d) 419, 424.....	43
Sutherland v. United States, 92 Fed. (2d) 305 (C. C. A. 4th)	38
United States v. Nettl, 121 Fed. (2d) 927 (C. C. A. 3rd)	39
United States v. River Rouge Co., 269 U. S. 411, 421	43

LIST OF AUTHORITIES (Continued).

Williams v. Great Southern Lumber Co., 277 U. S. 19, 26.....	43
Wilson v. United States, 4 Fed. (2d) 888 (C. C. A. 8th)	40

STATUTES.

Judicial Code, as Amended, Section 240 (28 U. S. C. A. 347).....	8
Judicial Code, as Amended, 269, U. S. C. A., 391.....	42
Ohio General Code Annotated, Sect. 5977.....	9
U. S. C. A., Title 5, Section 87a.....	9



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942.

No.

HERMAN BANNING AND FRANK WILLIAMS,
Petitioners,
vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT; AND BRIEF IN SUP-
PORT THEREOF.

*To the Honorable Harlan Fiske Stone, Chief Justice, and
the Associate Justices of the Supreme Court of the
United States:*

The petitioners, Herman Banning and Frank Williams, respectfully pray this Honorable Court to issue a writ of *certiorari* to review that judgment of the United States Circuit Court of Appeals for the Sixth Circuit, rendered August 28, 1942, in the cause entitled *Herman Banning and Frank Williams v. United States of America*, numbered 9071, which judgment affirmed two judgments of the United States District Court for the Eastern District of Michigan, Southern Division.

The first of such judgments convicted the petitioner Herman Banning of a violation of the National Stolen Property Act (U.S.C.A. Title 18, Sections 413-419) and of conspiracy to commit such violation (R. 7). The second judgment convicted the petitioner James Frank Williams of the same offenses (R. 8).

Summary and Short Statement of the Matter Involved.

The petitioners, together with one John McMann, were accused of having robbed one Samuel B. Weiss, the proprietor of a wholesale jewelry business, of jewelry having a value of \$11,000, and were further accused of transporting such jewelry in interstate commerce from a point near Detroit, Michigan to Chicago, Illinois. The robbery occurred on the outskirts of the city of Detroit on August 28, 1940 (R. 26 to 31).

It is not disputed that the robbery was in fact committed by McMann and some confederate. McMann, who pleaded guilty and testified for the government, implicated the petitioners. No other witness, not even the victim of the robbery, identified either of the petitioners as an accomplice (R. 32).

The matters appearing upon the record which the petitioners contend constituted error of such gravity as to call for exercise of this court's power of supervision may be briefly enumerated, without extended discussion at this point, as follows:

The Circuit Court of Appeals approved the action of the trial court in the following matters:

1. The trial court, over objection, not only permitted the petitioner Williams to be asked on cross-examination whether he had been tried *and acquitted* in a court in Nebraska on a charge of jewel robbery

(R. 241 to 244, 246 to 248), an alleged offense not connected with the crime for which the petitioners were on trial, but permitted cross-examination as to the identity of his witnesses and the nature of his defense on that trial. The Circuit Court of Appeals held that it was proper to show that

"Williams was arrested and tried at Omaha, Nebraska, although acquitted, as well as the circumstances of that trial"

because it

"affected his credibility as a witness" (R. 300).

2. The trial court, over objection, permitted both petitioners to be cross-examined at length concerning alleged offenses and arrests, not culminating in conviction (R. 185, 195, 196 to 199, 221, 222, 229, 234, 235, 250).

3. The trial court, over objection, permitted the petitioner Williams to be asked whether, 21 years before the date of the trial, he had thrown red pepper into the eyes of a law-enforcing officer and shot him, in an attempt to escape from such officer (R. 221 and 222).

4. The trial court, over objection, permitted the petitioner Banning to be asked on cross-examination whether, 10 years before the trial, he had been shot by the police in Council Bluffs, Iowa, when the police were pursuing him for a bank robbery. He was not shown to have been convicted of such bank robbery (R. 184).

5. The trial court, over objection, permitted the petitioner Williams to be asked whether, some months before the date of the inception of the alleged conspiracy for which the petitioners were on trial, he had not been in an automobile accident with one Howard Graves, and whether that person had not subse-

quently been convicted of a jewel robbery (R. 227 to 229). It was not contended either that Graves was implicated in the crime for which the petitioners were on trial in this case, or that either of them was implicated in the crime for which Graves was supposed to have been convicted.

6. Williams having testified that he did not know whether Graves had been convicted of a jewel robbery, the trial court, over objection, permitted a police officer to testify on rebuttal that he had been in a courtroom of a state court in Ohio when one Howard Graves was sentenced to the Ohio State Penitentiary. He further testified that the crime for which Graves was sentenced was one involving jewelry worth \$15,000, and that Graves was a man who had been arrested in Tennessee. The conviction of Graves did not occur until after Williams was supposed to have been in an automobile accident with him in Tennessee (R. 257 to 259).

7. The trial court, over objection, permitted evidence to show that, some three years prior to the trial, the petitioner Banning had been in Nebraska with Graves at the time of a jewel robbery. (This latter supposed jewel robbery was *not* in any way connected with the jewel robbery for which the petitioner Williams had been tried and acquitted, nor was it in any way connected with the offense for which the petitioners were on trial in this case) (R. 251 to 257).

8. The trial court, over objection, permitted the petitioner Banning to be asked whether, approximately seven months after the jewelry taken in the robbery for which the petitioners were on trial was supposed to have been sold to a fence, Banning had not offered a bribe of \$700 to a police officer in Calumet Park,

Illinois, in order to induce the latter to fabricate an alibi in connection with still a third alleged jewel robbery in Nebraska (R. 195 to 199).

9. Banning having denied offering the bribe above-mentioned, the trial court, over objection, permitted the police officer from Calumet Park to testify that such a bribe was in fact offered (R. 259 to 263).

10. The trial court permitted the officer who testified that Banning had offered the supposed bribe in question further to testify, from hearsay, that he was present in the State's Attorney's office in Chicago, Illinois, when a blackjack, mask, and revolver were brought into the office, and that those implements were found in Banning's flat at the time of Banning's arrest, seven months after the robbery of Weiss. The officer was not present when these articles were found, nor was any blackjack or mask an instrument of the crime for which the petitioners were on trial, nor was it shown that the revolver which was found was used in the commission of that crime (R. 264 to 266).

The Circuit Court of Appeals criticized, but held harmless, the following conduct on the part of the trial court:

11. As has been observed above, the trial court permitted cross-examination of Williams with respect to the identity of his witness and the nature of the defense which he had offered on the trial, resulting in his acquittal, in Omaha, Nebraska, for a jewel robbery; and the Circuit Court of Appeals held this proper.

On re-direct examination Williams stated that one of his witnesses in that case was a law-enforcing officer of Nebraska (R. 247).

In ruling on an objection, the trial court said, concerning the man whom Williams had named as one of his witnesses in Nebraska:

"You told about that fake detective, what do you call him, private detective, as former detective on the force" (R. 248).

There was no evidence in the record to indicate that the witness in the Omaha trial was a "fake detective."

12. When counsel for the defense objected to the exhaustive cross-examination of Williams as to his trial in Omaha, Nebraska, the court not only overruled the objection, but, in announcing his ruling, said that the evidence was proper to show

"the defense that these men put up at Louisville or Omaha *to get out of that case there*" (R. 241).

* * *

The petitioners contend that the evidence of their guilt is doubtful and uncertain, that the evidence of their innocence was substantial and persuasive, and that the errors above indicated were, therefore, prejudicial. It will be shown more particularly in the brief in support of this petition that:

1. No witness other than McMann, who testified as a confessed accomplice, implicated either of the petitioners in the robbery of Weiss, except that Weiss did testify to a similarity between the voice of one of his assailants (whom he did not see) and the voice of Williams, which he heard eleven months after the robbery at a police show-up (R. 32).

2. McMann testified that he met Banning and Williams in a chance encounter in Detroit, Michigan in the latter part of April, 1940 (R. 73). The govern-

ment stipulated that at the time in question Banning was in jail in Louisville, Kentucky (R. 162). McMann testified that, immediately after this chance meeting, all three of them drove directly to Chicago, where McMann registered under the name of Jack King at a hotel. He further testified that he made his headquarters at that hotel and under that name during the months from April to August, 1940 (R. 74, 97, 98, 99, 102, 103, 110 and 111). The clerk of the hotel produced the register, which disclosed that no such name as that of Jack King appeared thereon at any time during the months in question (R. 174 and 175).

3. McMann further testified that he was gone "every day during the week, all week each week" (R. 76) with petitioners from April to August, 1940 in search of jewelry salesmen as potential victims of robberies, his reconnaissance trips extending throughout the states surrounding Illinois. He testified that he had been in Chicago except for the time he was on the road ever since the latter part of April, 1940 (R. 100). A *government* witness testified, however, that from June 7, 1940 until the latter part of July (R. 133 and 134) of that summer she was living with him as his mistress, in Peoria, Illinois and that

"he was home every night when I came home"
(R. 134).

4. McMann testified that on August 26, 1940 he, Banning and Williams left Chicago, located Weiss in Indiana, and followed him to Michigan (R. 103). Banning, in addition to his own testimony, introduced a passenger list from the American Airlines showing his signature as a passenger from Louisville, Kentucky, in a suburb of which city he was living, to Cincinnati, Ohio (R. 164 to 167). He also introduced

into evidence a mortgage, made long prior to the offense for which he was on trial, bearing his signature (R. 168 to 170). The handwriting on the mortgage and that upon the passenger list was indubitably the same, and except by McMann's testimony that Banning was in his presence at that time, the government made no attempt to dispute the genuineness of the signature (R. 168 to 169).

5. The petitioner Williams testified that on August 26, 1940, on which date McMann places him in northern Indiana, he was in fact in Chicago (R. 205 and 206). His testimony is corroborated by that of a member of his family (R. 238). He also testified that on August 28, the date of the robbery he pawned a watch in Chicago (R. 206). His testimony is corroborated by the records of the pawnbroker (R. 212 to 216), which records were furnished to the Chicago police in pursuance of official regulations.

* * *

The matters indicated in the foregoing short summary and statement of the matter involved are developed in more detail in the statement in the brief accompanying this petition.

**Statement of the Basis Upon Which It Is Contended That
This Court Has Jurisdiction to Review the Judgment
in Question.**

The jurisdiction of this court is invoked pursuant to Section 240 of the Judicial Code, as amended (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 31, 1911 c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938). (28 U.S.C.A., Sec. 347).

The judgment in question was rendered by the Circuit Court of Appeals for the Sixth Circuit on August 28,

1942, and is reported in 130 Fed. (2d) 330. Rehearing was denied on October 7, 1942.

Excluding Sundays and holidays under Rule 13 of this court's Rules Governing Criminal Appeals, thirty days from the date of the denial of the petition for rehearing expires November 12, 1942.

November 11 is a legal holiday in Ohio (Sect. 5977 Ohio General Code Annotated).

November 11 is declared a public legal holiday (U.S.C.A. Title 5, Section 87a).

Statement of the Questions Presented.

The questions presented are:

First: Whether it was reversible error to permit cross-examination of a defendant as to the fact that he had been tried for and *acquitted* of another jewel robbery, as to the identity of his witnesses, and as to the nature of the defense which he interposed at that trial.

Second: Whether it was reversible error to permit cross-examination of one of petitioners as to whether he had been shot by the police ten years before the trial, in connection with a bank robbery of which he was suspected but not convicted.

Third: Whether it was reversible error to permit cross-examination of one of the petitioners as to whether, 21 years before the trial, he had thrown red pepper into the eyes of a law-enforcing officer and had shot him, for which alleged offense he was never convicted.

Fourth: Whether it was reversible error to permit the government to show that each of the petitioners, separately, and on occasions remote from each other by some

years, had been in the company of a man who, subsequently to both of such associations, had been convicted of a jewel robbery in which neither of the petitioners was supposed to have been implicated.

Fifth: Whether it was reversible error to permit a police officer to testify that such person, so shown to have been an acquaintance of each of the petitioners, separately, had been convicted of a robbery involving \$15,000 worth of jewels.

Sixth: Whether it was reversible error to permit one of petitioners to be cross-examined as to whether, seven months after the jewelry involved in the instant case was alleged to have been disposed of, he had offered a law-enforcing officer a bribe in connection with an entirely independent offense.

Seventh: Whether it was reversible error to permit a police officer to testify, in rebuttal of petitioner's denial of the bribe above mentioned, that in fact such bribe had been offered.

Eighth: Whether it was reversible error to permit a police officer to testify, from hearsay, that certain implements of crime were found in the apartment of one of the petitioners at the time of the latter's arrest, when neither these nor similar implements of crime had been used in connection with the offense for which the petitioners were on trial.

Ninth: Whether it was reversible error for the trial court to characterize a person who had been mentioned as a witness for one of petitioners in another case as a "fake detective".

Tenth: Whether it was reversible error for the trial court, in announcing his ruling on an objection, to state

that he would permit evidence of the character of an *alibi* in another case as tending to show

"the defense that these men put up * * * to get out of that case there." (R. 241).

Eleventh: Whether the competent evidence as to the petitioners' guilt was so uncertain as to render it error for the Circuit Court of Appeals to affirm judgments convicting petitioners in this case.

Statement of the Reasons Relied on for the Allowance of the Writ.

The petitioners maintain that the Circuit Court of Appeals, in affirming the judgment of the District Court, has decided the federal questions above stated in conflict with the applicable decisions of this court cited in the brief in support of this petition, *post*, and has sanctioned procedure in the trial court so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Prayer.

Wherefore, the petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit demanding that court to certify and to send to this court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9071, *Herman Banning and Frank Williams v. United States of America*, and that such judgment of the Circuit Court of Appeals for the Sixth Circuit may be reversed.